IN THE CIRCUIT COURT, SEVENTH JUDICIAL CIRCUIT, IN AND FOR VOLUSIA COUNTY, FLORIDA

CASE NO.: 13-31402-CICI

MICHAEL H. LAMBERT,

Plaintiff,

vs.

R. J. LARIZZA, AS STATE ATTORNEY FOR THE SEVENTH JUDICIAL CIRCUIT OF THE STATE OF FLORIDA,

Defendant.
_____/

**ORDER GRANTING DEFENDANT'S MOTION TO DISMISS**

This case came before the Court September 4, 2013, for a hearing on the Motion to Dismiss, filed July 22, 2013, by Defendant, R. J. Larizza, as State Attorney for the Seventh Judicial Circuit, State of Florida. The Court heard argument of counsel, considered the Motion and Incorporated Memorandum of Law, the Amended Complaint for Injunctive Relief and to Declare State Statutes Unconstitutional, the papers on file, and relevant authority. Based upon this record, the Court makes the following findings of fact and conclusions of law.

1. In ruling on the Motion to Dismiss, the Court assumes the truth of all ultimate facts pled in the Amended Complaint. In this Complaint, Plaintiff alleges that records of his prescription history were disclosed to Defendant's office, to the "Narcotics Task Force," and to the U.S. Drug Enforcement Administration. (Am. Compl. ¶¶ 4, 20.) He argues that Florida's Prescription Drug Monitoring Program ("PDMP"), set forth in sections 893.055 and 893.0551, Florida Statutes, unconstitutionally infringes upon Florida citizens' fundamental right of privacy (Article

I, Section 23, Florida Constitution), right to be free from unreasonable searches and seizures (Article I, Section 12, Florida Constitution), and right to due process of law (Article I, Section 9, Florida Constitution). (Am. Compl. ¶¶ 9-12.)

2. Plaintiff alleges that, in 2012, law enforcement agents obtained personal information about him, as well as similar information about approximately 3,300 other Florida citizens, when law enforcement agents requested and received from the PDMP database twelve months of prescription history data for all persons in a certain area around Lake Mary, Florida, who had been prescribed certain drugs by certain healthcare providers. (Am. Compl. ¶ 20.) As a result of that investigation, six persons were arrested and prosecuted; the remainder of the approximately 3,300 persons, including Plaintiff, were never the subject of the investigation, and Plaintiff maintains that he is innocent. (Am. Compl. ¶¶ 22-23, 25.) Assistant State Attorneys assigned to the six criminal cases received all of the prescription history information for all of the approximately 3,300 persons, including Plaintiff; the same information was disclosed, through discovery, to counsel for each of the six defendants. (Am. Compl. ¶ 26-27.) Plaintiff alleges that "[t]he confidential data collected and disclosed included the patient's name, the patient's full address, the patient's date of birth, the medications prescribed to the patient, including dosages, the location of the issuing pharmacy and the date on which the prescriptions were filled." (Am. Compl. ¶ 31.)

3. Plaintiff seeks an injunction directing Defendant to recall, collect, and place under seal all prescription history records of the Plaintiff, and the other approximately 3,300 persons, to seek the return of any copies in possession of law enforcement agencies, to prohibit the further disclosure of the records, to identify computer equipment on which copies were made and to account for the copies, and to notify each of the approximately 3,300 persons, by certified letter, of

the Defendant's receipt of the records. (Am. Compl. pp. 12-14.) Plaintiff also seeks a declaration that certain portions of sections 893.055 and 893.0551, Florida Statutes, are unconstitutional. (Am. Compl. pp. 14-16.)

4. Law enforcement agencies "shall not be allowed direct access to information in the [PDMP] database[,]" but may request access from the program manager "during active investigations regarding potential criminal activity, fraud, or theft regarding prescribed controlled substances." § 893.055(7)(c)3., Fla. Stat. (2012). In addition, "[t]he [PDMP] manager, upon determining a pattern consistent with the rules established under paragraph (2)(d) and having cause to believe a violation of s. 893.13(7)(a)8., (8)(a), or (8)(b)[1] has occurred, may provide

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1 Section 893.13(7)(a)8. provides that a person may not

> [w]ithhold information from a practitioner from whom the person seeks to obtain a controlled substance or a prescription for a controlled substance that the person making the request has received a controlled substance or a prescription for a controlled substance of like therapeutic use from another practitioner within the previous 30 days."

§ 893.13(7)(a)8., Fla. Stat. (2012). Section 893.13(8)(a) provides that

> a prescribing practitioner may not:
>
> 1. Knowingly assist a patient, other person, or the owner of an animal in obtaining a controlled substance through deceptive, untrue, or fraudulent representations in or related to the practice of the prescribing practitioner's professional practice;
>
> 2. Employ a trick or scheme in the practice of the prescribing practitioner's professional practice to assist a patient, other person, or the owner of an animal in obtaining a controlled substance;
>
> 3. Knowingly write a prescription for a controlled substance for a fictitious person; or
>
> 4. Write a prescription for a controlled substance for a patient, other person, or an animal if the sole purpose of writing such prescription is to provide a monetary benefit to, or obtain a monetary benefit for, the prescribing practitioner.

§ 893.13(8)(a), Fla. Stat. (2012). Section 893.13(8)(b) provides that

> [i]f the prescribing practitioner wrote a prescription or multiple prescriptions for a controlled substance for the patient, other person, or animal for which there was no medical necessity, or which was in excess of what was medically necessary to treat the patient, other person, or animal, that fact does not give rise to any presumption that the prescribing practitioner violated subparagraph (a)1., but may be considered with other competent evidence in determining whether the prescribing

relevant information to the applicable law enforcement agency." § 893.055(7)(f), Fla. Stat. (2012). The information is also expressly made confidential and exempt from public disclosure under section 119.07(1), Florida Statutes, and Article I, section 24, Florida Constitution. § 893.0551(2), Fla. Stat. (2012).

5. When a defendant in a criminal case elects to participate in discovery, the prosecutor is obligated to disclose to the defendant "whether there has been any search or seizure and any documents relating thereto[,]" as well as "any tangible papers or objects that the prosecuting attorney intends to use in the hearing or trial and that were not obtained from or that did not belong to the defendant." Fla. R. Crim. P. 3.220(b)(1)(I), (K). The entirety of the records at issue in this case are documents relating to the search that occurred in the six criminal cases, and the State was obligated to disclose the records of all of the approximately 3,300 persons, including Plaintiff, to those defendants in the criminal cases.

6. Plaintiff likens the information at issue to medical records, citing Hunter v. State, 639 So. 2d 72 (Fla. 5th DCA 1994), for the proposition that medical records are confidential pursuant to Article I, section 23 of the Florida Constitution, and that a trial court must act as a shield to protect patients' privacy rights. (Am. Compl. ¶ 40.) However, the law recognizes a distinction between the kind of information at issue in this case—prescription records—and medical records. See State v. Tamulonis, 39 So. 3d 524, 527 (Fla. 2d DCA 2010)(reversing suppression of prescription records seized from pharmacies without a warrant, distinguishing records of pharmacists from those of health care practitioners and licensed facilities).

7. Information similar to that at issue in this case is readily available to law

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practitioner knowingly assisted a patient, other person, or the owner of an animal to obtain a controlled substance in violation of subparagraph (a)1.

§ 893.13(8)(b), Fla. Stat. (2012).

enforcement agents under a different statute, section 893.07, Florida Statutes, which provides, in relevant part,

> [T]he records described in this subsection shall be kept and made available for a period of at least 2 years for inspection and copying by law enforcement officers whose duty it is to enforce the laws of this state relating to controlled substances. Law enforcement officers are not required to obtain a subpoena, court order, or search warrant in order to obtain access to or copies of such records.

§ 893.07(4), Fla. Stat. (2012).

8. Courts have upheld section 893.07 against constitutional challenges based on Florida's right of privacy. State v. Carter, 23 So. 3d 798, 802 (Fla. 1st DCA 2009)(reversing order suppressing pharmacy records). In Tamulonis, the district court recognized that the right of privacy afforded under the Florida Constitution "is broader in scope than that of the United States Constitution. See Winfield v. Div. of Pari-Mutuel Wagering, 477 So. 2d 544, 548 (Fla. 1985). However, this right to privacy is not absolute." Tamulonis, 39 So. 3d at 527 (citation omitted). The court then set forth the Florida Supreme Court's test of a privacy violation under the Florida Constitution:

> First, courts must determine whether the individual possesses a legitimate expectation of privacy in the information or subject at issue. If so, the burden shifts to the State to show (a) that there is a compelling state interest warranting the intrusion into the individual's privacy and (b) that the intrusion is accomplished by the least intrusive means.

Tamulonis, 39 So. 3d at 528 (citation omitted). Applying the test, the district court first noted that, although there is a privacy interest in prescription records, "[t]he fact that the legislature requires pharmacies to keep records available for review and copying should obviously reduce a person's expectation of privacy about prescriptions that are filled at pharmacies." Id. (citation and internal quotation marks omitted). The court then analyzed the two elements on which the State carries the burden and held that the State has a compelling interest in regulating controlled

substances, and that the statute is narrowly tailored. Id.; see also Carter, 23 So. 3d at 801 (noting that control and prosecution of crime is a compelling state interest). The Tamulonis court identified three factors in support of its conclusion that section 893.07, Florida Statutes, is narrowly tailored:

> First, the statute only applies to controlled substance records. Second, the records do not convey information about a patient's medical condition. Finally, such data is not available to the general public, but only to "law enforcement officers whose duty it is to enforce the laws of this state relating to controlled substances." § 893.07(4) . . . .

Tamulonis, 39 So. 3d at 528 (citation omitted); see also State v. Yutzy, 43 So. 3d 910, 911 (Fla. 2d DCA 2010)(following Carter and Tamulonis). The Fourth District Court of Appeal has also upheld section 893.07 against a privacy challenge. Gore v. State, 74 So. 3d 1119, 1122 (Fla. 4th DCA 2011).

9. This Court concludes that the reduced expectation of privacy found in Tamulonis applies with equal force here. The reduced expectation of privacy results from having a prescription filled at a pharmacy; therefore, even though Plaintiff is not a defendant in a criminal case, that distinction from Tamulonis and Carter is without legal significance to the issue of expectation of privacy. Florida's compelling interest in regulating controlled substances, cited in Tamulonis, also warrants the intrusion into privacy occasioned by the PDMP. This Court also concludes that the PDMP and its operation are narrowly tailored, for the reasons identified by the Tamulonis court regarding section 893.07, Florida Statutes. The PDMP collects records only relating to prescriptions for controlled substances. § 893.055(2)(a), Fla. Stat. (2012). Records maintained in the PDMP database "do not convey information about a patient's medical condition." Tamulonis, 39 So. 3d at 528; § 893.055(3), Fla. Stat. (2012). Similar to information retained pursuant to section 893.07, information maintained in the PDMP database is not available

to the general public. Requests for information are directed to the PDMP manager, who verifies that a request is "authentic and authorized by the requesting organization . . . ." § 893.055(7)(c), Fla. Stat. (2012). Therefore, this Court concludes that Plaintiff has failed to allege an infringement of his rights under Article I, section 23, Florida Constitution.

10. The reduced expectation of privacy in prescription records, and the compelling government interest in regulating controlled substances, also inform the analysis under Article I, section 12, Florida Constitution, of the warrantless search and seizure of records. "[T]he ultimate measure of the constitutionality of a government search is 'reasonableness.'" Maryland v. King, --- U.S. ---, 133 S.Ct. 1958, 1969 (2013)(citation and internal quotation marks omitted). To test the reasonableness of a warrantless search, a court must "weigh the promotion of legitimate governmental interests against the degree to which [the search] intrudes upon an individual's privacy." Id. at 1970 (citation and internal quotation marks omitted). In King, The United States Supreme Court recognized that a warrantless search or seizure may be reasonable in situations where "an individual is already on notice . . . that some reasonable police intrusion on his privacy is to be expected." Id. at 1969. King upheld the constitutionality of taking DNA samples by cheek swab from arrested persons during the booking process, without a warrant. Id. at 1965-66. Although the context in which the reduced expectation of privacy arises is different in the instant case from that in King, this Court concludes that the government's compelling interest in regulating controlled substances, noted by the Tamulonis and Gore courts, justifies the intrusion into Plaintiff's privacy, as to which his expectation was already reduced. The warrantless search and seizure of the prescription records of Plaintiff and the other approximately 3,300 persons was reasonable, and did not violate the constitutional protection against unreasonable searches and seizures.

11. Plaintiff alleges that the PDMP deprives him of due process in several respects. He argues that the definition of "active investigation" found at section 893.055(1)(h) is vague and imprecise, and is "an open investigation for law enforcement to conduct fishing expeditions . . . ." (Am. Compl. ¶ 15.) He asserts that the requirement of section 893.055(7)(c) that a law enforcement request be verified as authentic and as having been authorized by the requesting entity "as determined in rules by the department" "provides little, if any, protection for the privacy or due process rights of Florida citizens." (Am. Compl. ¶ 16.) He contends that the limitation on access by law enforcement agencies "during active investigations regarding potential criminal activity, fraud, or theft regarding prescribed controlled substances[,]" found at section 893.055(7)(c)3., "is a vague, overly broad, general pronouncement which allows any law enforcement agency to have access to every citizen's personal prescription histories." (Am. Compl. ¶ 17.) Finally, he alleges that sections 893.055 and 893.0551, Florida Statutes, "are arbitrary and capricious in that there is no opportunity for a citizen to contest unwarranted intrusions into his prescription history and personal data." (Am. Compl. ¶ 48.)

12. The statutory definitions of terms at issue are not "so vague that men of common intelligence must necessarily guess at [their] meaning." D'Alemberte v. Anderson, 349 So. 2d 164, 166 (Fla. 1977). Indeed, as Defendant points out, the definition of "active investigation" found at section 893.055(1)(h), Florida Statutes, closely resembles that of "active criminal investigative information" found at section 119.011(3)(d)2., a definition which courts have applied without difficulty. See Barfield v. City of Ft. Lauderdale Police Dep't, 639 So. 2d 1012, 1016 (Fla. 4th DCA 1994); News-Press Publ'g Co. v. Sapp, 464 So. 2d 1335, 1336 (Fla. 2d DCA 1985).

13. Inspection and copying of prescription records by law enforcement pursuant to section 893.07, Florida Statutes, which has been upheld by the courts in Carter, Tamulonis, and

Gore, does not require the verification of a law enforcement request as authentic and as authorized by the requesting entity, as is required by the PDMP statutes, but only that the records be made available "for inspection and copying by law enforcement officers whose duty it is to enforce the laws of this state relating to controlled substances." § 893.07(4), Fla. Stat. (2012). Therefore, the greater protections of individuals' rights afforded by the PDMP program cannot be unconstitutionally vague, imprecise, overbroad, arbitrary or capricious. The PDMP does not invite fishing expeditions by law enforcement any more than does section 893.07(4) or, for that matter, section 119.011, Florida Statutes. The compelling state interest recognized in those cases construing section 893.07, and an arguably more-narrowly-tailored statute, defeat Plaintiff's due process claims as a matter of law.

14. Injunctive relief requires a showing of: "(1) The likelihood of irreparable harm; (2) the unavailability of an adequate remedy at law; (3) substantial likelihood of success on the merits; and (4) considerations of the public interest." City of Jacksonville v. Naegele Outdoor Advertising Co., 634 So. 2d 750, 752 (Fla. 1st DCA 1994)(citation omitted). As stated above, Florida Rule of Criminal Procedure 3.220 required that the State disclose to defense counsel in the six criminal cases the records at issue in this case. In addition, this Court concludes in this Order that Plaintiff's constitutional challenges to the PDMP fail as a matter of law. Therefore, his likelihood of success on the merits, as pled, is nil. Plaintiff also fails to allege facts supporting a likelihood of irreparable harm, where the prosecutor, as alleged, merely disclosed the PDMP data to defense counsel in the six criminal cases. In those cases, Plaintiff had, and may still have, the remedy of a protective order, so he has failed to allege that he lacks an adequate remedy at law. Finally, the public interest in control and prosecution of crime, noted in Carter, and in regulation of controlled substances specifically, noted in Tamulonis, demonstrate that considerations of the

public interest militate against, rather than in favor of, injunctive relief. This Court concludes that Plaintiff has failed to state a cause of action for injunctive relief.

Therefore, it is

**ORDERED AND ADJUDGED** that the Defendant's Motion to Dismiss is **GRANTED**; the Amended Complaint is dismissed without prejudice to Plaintiff's right to serve and file a second amended complaint at any time before the expiration of 30 days after the date this Order is entered.

**DONE AND ORDERED** in chambers at Jacksonville, Duval County, Florida, this _____ day of February, 2014.

ORDER ENTERED

FEB 13 2014

/s/ WADDELL A. WALLACE

**WADDELL A. WALLACE III**
**Circuit Judge**

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